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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

JUSTIN LARKIN, ANTHONY TIJERINO, and  
AHMAD DEANES, on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

YELP! INC.,

Defendant.

Case No. 3:11-cv-01503-EMC  
**NOTICE OF MOTION AND MOTION FOR  
AN ORDER (1) GRANTING FINAL  
APPROVAL OF CLASS AND  
COLLECTIVE ACTION SETTLEMENT;  
(2) APPROVING AWARD OF CLASS  
REPRESENTATIVE SERVICE  
PAYMENTS; (3) APPROVING AWARD OF  
ATTORNEYS' FEES AND COSTS.**

**[DECLARATIONS OF PETER RUKIN  
ROSA GALLENBERG, THOMAS URMY  
AND KRISTA TITTLE FILED  
CONCURRENTLY]**

Date: November 30, 2012  
Time: 2:30 p.m.  
Courtroom: 5 -17<sup>th</sup> Floor  
Judge: Hon. Edward M. Chen

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**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL**

**TO DEFENDANT AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT on November 30, 2012, at 2:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 5 of the United States District Court for the Northern District of California, located at 450 Golden Gate, San Francisco, California, Plaintiffs will move for final approval of the class and collective action settlement reached in this case, an award of class representative service payments in the aggregate amount of \$15,000, attorney's fees in the amount of \$205,000, litigation costs in the amount of \$9,461.62, payment of \$7,500 to the California Labor and Workforce Development Agency (LWDA), and settlement administrative expenses of \$16,000.

Plaintiffs' motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities that appears below, the Declaration of Peter Rukin, the Declaration of Rosa Vigil-Gallenberg, the Declaration of Thomas Urmey, the Declaration of Krista Tittle of Claims Administrator Simpluris, Inc., the papers and pleadings on file in this action, and such other evidence as may be presented at the motion hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT**

**I. INTRODUCTION**

On July 12, 2012, the Court entered an Order granting preliminary approval of the class and collective action settlement reached in this action against Yelp!, Inc. ("Yelp"). Since that time, notice of the settlement has been distributed to the Class. Class Members' reaction to the settlement generally has been positive. 275 out of 488 California Class Members submitted claims (representing approximately 67 percent of the total weeks worked by all California Class Members), and 145 out of 454 National Class Members have submitted claims (representing approximately 33 percent of the total weeks worked by all National Class Members). Two

1 California Class Members have chosen to opt out of the settlement, and no Class Members have  
2 objected to the Settlement.

3 The results of Class Notice provide no ground for questioning the Court's original  
4 determination that the Settlement is fair, reasonable and adequate. Pursuant to the Settlement, and  
5 should all late and deficient claims be honored, approximately \$455,000 shall be paid to California  
6 Participating Claimants and approximately \$152,000 shall be paid to National Participating  
7 Claimants.<sup>1</sup> In addition, Class Counsel are requesting an award of attorneys' fees in the amount of  
8 \$205,000 and litigation costs of \$9,461.62. After payment of settlement claims, attorneys' fees,  
9 litigation costs, administration expenses, enhancement awards, and LWDA payment, it appears  
10 that more than \$845,000 of the \$1,250,000 Maximum Settlement Amount will be paid (should all  
11 late and deficient claims be honored).<sup>2</sup>

12 Accordingly, Plaintiffs respectfully request that the Court grant final approval of the  
13 Settlement, award Class Counsel attorneys' fees and costs of \$214,461.62, approve the Settlement  
14 Administrator's expenses of \$16,000, order payment of \$7,500 to LWDA, and approve incentive  
15 awards of \$5,000 each to the three Class Representatives.

## 16 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

17 Yelp is a San Francisco-based company which operates a social networking and user  
18 review website. Yelp generates revenue through the sale of advertising and uses inside sales  
19 personnel, called "Account Executives," to secure its advertising business. Account Executives  
20 work under different titles, depending on their experience and seniority: account executive trainee,  
21 junior account executive, account executive, or senior account executive. Regardless of title, all  
22 Account Executives have the same core responsibility to sell Yelp's advertising products.

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23  
24 <sup>1</sup> This distribution calculation is based on Class Counsel's request that more than \$100,000 of the initial  
attorneys' fee amount of \$312,500 be redistributed to the California and National Classes.

25 <sup>2</sup> As of October 19, 2012, the settlement administrator and parties are working to resolve 8 late claims, 3  
26 deficient claims, and 3 claims by individuals who were not included on the original class list but who  
27 contend they are part of the Settlement Class. As of the filing date of this Motion, Yelp has agreed that the  
28 three additional individuals are part of the Class but has not yet provided their workweek data to the  
Settlement Administrator. After all late and deficient claims are resolved, and workweek data for the three  
additional individuals is obtained, Counsel will submit an updated report to the Court.

1 From the beginning of its operations until approximately March 2011, Yelp classified its  
 2 Account Executives as exempt from federal and state overtime laws. Yelp paid all Account  
 3 Executives under a similar compensation plan during the liability period. Although some details  
 4 varied, all Account Executives received a base salary and had the ability to earn additional  
 5 compensation or to move to a higher level of compensation based on performance.

6 Each of the Plaintiffs worked for Yelp as an Account Executive. Docket Number (“Dkt.  
 7 No.”) 4, at ¶ 9-11. Plaintiff Larkin worked in Yelp's San Francisco office from September 2008 to  
 8 March 2009 and Plaintiff Tijerino worked in the San Francisco office from February 2010 through  
 9 November 2010. *Id.* at ¶ 9-10. Plaintiff Deanes worked out of Yelp’s Scottsdale, Arizona office  
 10 from October 2010 to January 2011. *Id.* at ¶ 11.

11 Plaintiffs contend that Yelp misclassified its Account Executives as exempt from overtime,  
 12 and that, on the basis of this exempt classification, Yelp did not pay Account Executives the  
 13 overtime wages required under the FLSA or California law.

14 Yelp contends that Plaintiffs’ claims have no merit. Yelp asserts that the majority of class  
 15 members, including both of the California named Plaintiffs, previously signed releases that prevent  
 16 them from bringing the claims asserted in this lawsuit. Yelp also claims that many class members  
 17 have agreed to pursue any claims that they may have in arbitration individually rather than on a  
 18 class or collective action basis, effectively precluding them from participating in this action.

#### 19 **A. Procedural History**

20 On March 29, 2011, Plaintiff Justin Larkin filed this action in the United States District  
 21 Court for the Northern District of California, asserting claims under the FLSA for unpaid overtime  
 22 and under the California Labor Code for unpaid overtime, waiting time penalties, wage statement  
 23 damages, and restitution. Dkt. No. 1.

24 On April 18, 2011, Plaintiff Justin Larkin provided notice to the California Labor and  
 25 Workforce Development Agency and Yelp in accordance with the procedures set forth in the  
 26 California Labor Code’s Private Attorneys General Act, Labor Code § 2698 *et. seq.* (PAGA). The  
 27 PAGA notice included a file-endorsed copy of the complaint.  
 28



1 On April 19, 2011, Plaintiffs filed an amended complaint adding two additional plaintiffs,  
2 Anthony Tijerino and Ahmad Deanes. Dkt. No. 4.

3 On May 11, 2011, the parties executed an agreement tolling the FLSA statute of limitation  
4 for all potential collective action members effective May 11, 2011. Declaration of Peter Rukin In  
5 Support of Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement  
6 ("Rukin Decl.") ¶ 7. On May 20, 2012, the parties executed a stipulation requesting a stay of the  
7 proceedings pending mediation and permitting the filing of a second amended complaint adding a  
8 PAGA claim in the event that mediation failed and the Court thereafter lifted the stay. Dkt. No. 8.  
9 On May 24, 2011, the Court granted the requested stay. Dkt. No. 11.

10 Plaintiffs engaged in an investigation into their claims and Yelp's potential defenses,  
11 including interviewing numerous class members and reviewing and analyzing documents reflecting  
12 Yelp's compensation policies, employment agreements, and workweek data. Rukin Decl., ¶ 6.  
13 Additionally, Plaintiffs reviewed an analysis produced by Yelp reflecting time worked by a  
14 representative sample of Account Executives, using data gathered from phone systems used by  
15 Account Executives. *Id.*

16 On September 15, 2011, the parties participated in a mediation with Mark Rudy of Rudy,  
17 Exelrod, Zieff & Lowe. Although the parties did not reach a settlement on that date, they  
18 continued to engage in extensive and thorough settlement discussions for over six-months. As a  
19 result of these discussions, the parties agreed to the terms and conditions set forth in the Settlement  
20 Agreement for which Plaintiffs now seek final approval. Rukin Decl., ¶ 8.

21 On July 12, 2012, this Court preliminarily approved the Settlement with modifications,  
22 provisionally certified the Settlement Class, directed class notice to be sent and set a final approval  
23 and fairness hearing<sup>3</sup>. (Dkt. No. 42). Class Notice was distributed pursuant to the Notice Plan  
24 approved by the Court, and the period for submitting settlement claims and opting out of the  
25

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26 <sup>3</sup> The hearing was originally scheduled for November 15, 2012 but was later continued to  
27 November 30, 2012. Dkt. 45. Notice of the new hearing date was posted on the website made  
28 available for purposes of this settlement. The parties have respectfully requested that the court  
clerk post notice of the new date on the front door of courtroom on November 15, 2012 alerting  
class members of the new hearing date.

1 settlement has now closed. (Dkt. No. 42, 37, 32; Declaration of Krista Tittle (“Tittle Decl.”) at ¶  
2 9).

### 3 **III. TERMS OF SETTLEMENT**

4 The parties’ Settlement Agreement and Release of Claims (the “Settlement”) is attached as  
5 Exhibit 1 to the Declaration of Peter Rukin in Support of Final Approval. (hereinafter referred to  
6 as “Exh. 1”). This was amended per the parties’ stipulation. (Dkt. 37). The following is a summary  
7 of its terms.

#### 8 **A. The Settlement Class**

9 The Settlement Class is composed of the “California Class” and the “National Class.” The  
10 California Class consists of all Persons employed by Yelp as an Account Executive in California  
11 from March 29, 2007 through December 31, 2011. Exh. 1, ¶ 1.2 & 1.4. The National Class  
12 consists of all Persons employed by Yelp as an Account Executive in the United States outside of  
13 California between May 11, 2008 and December 31, 2011. *Id.* at ¶ 1.25 & 1.27. Both Classes  
14 include the following job titles: Account Executive, Account Executive Trainee, Associate  
15 Account Executive Trainee, Associate Account Executive, Junior Account Executive, Sales  
16 Associate, Sales Representative, and Senior Account Executive. *Id.* at ¶ 1.1

17 The Settlement provides that Class Members must submit a claim form and thereby become  
18 either a “National Participating Claimant” or “California Participating Claimant.” Members of the  
19 National Class who do not submit a claim form do not release any claims that they may have for  
20 violations of any federal or state wage and hour laws. Members of the California Class who do not  
21 submit a claim form and who do not opt out of the Settlement will release their claims under the  
22 terms of the Settlement. *Id.* at ¶ 1.8

#### 23 **B. Relief to the Settlement Class**

24 The Settlement provides that Yelp will pay up to \$1,250,000 as the Maximum Settlement  
25 Amount. *Id.* at ¶ 1.22. Payment for court-approved attorneys’ fees and costs, court-approved  
26 enhancement payments to the Class Representatives, fees and expenses of the Claims  
27 Administrator, and payment of a PAGA penalty to the State of California will be deducted from  
28

1 the Maximum Settlement Amount. *Id.* The Settlement Agreement provides that the initial  
 2 maximum settlement portion for payments to California Participating Claimants is \$586,667 and to  
 3 National Participating Claimants is \$293,333, but that these settlement portions may be increased  
 4 in the event that any amounts allocated towards Class Counsel's attorney fees and costs and the  
 5 Representative Plaintiff enhancement awards are not sought or awarded. *Id.* at ¶ 1.23 & 1.24. The  
 6 total amount that Yelp is required to pay under the Settlement Agreement depends on the number  
 7 of Class Members who become Participating Class Members by submitting claim forms and  
 8 thereby participate in the settlement.

9 Participating Class Members will be paid based on the total number of weeks worked in  
 10 covered positions during the relevant class period by all eligible Class Members. Each  
 11 Participating Class Member will receive his or her *pro rata* share of the Settlement pursuant to the  
 12 following formula: The total number of weeks worked by each participating Class Member will be  
 13 divided by the total number of weeks worked by all Class Members and the resulting percentage  
 14 will be multiplied by the maximum settlement portion for the California Claimants and/or the  
 15 National Claimants.

### 16 **C. Release of Claims**

17 The Settlement stipulated that in exchange for the payment of the Settlement Amount, the  
 18 Representative Plaintiffs, all National Class Members who submitted claims, and all California  
 19 Class Members who did not opt-out of the Settlement would release all claims against Yelp that  
 20 were alleged in this case or that reasonably arose out of the facts alleged in this case. Exh. 1., ¶ 1.6  
 21 & 1.30.

### 22 **D. PAGA Payment, Class Representatives' Incentive Payments, Attorneys Fees and** 23 **Costs, and Settlement Administration**

24 The Settlement provides for each of the following: (1) payment of \$7,500 to LWDA in  
 25 connection with Plaintiffs' PAGA claim; (2) service payments to the named Class Representatives  
 26 not to exceed \$5,000 each; (3) payment of \$16,000 to the Settlement Administrator; and (3) Class  
 27 Counsel's attorneys' fees and costs, not to exceed \$312,500 for attorneys' fees and \$10,000 for  
 28 costs. Exh. 1, ¶ 1.22 & 2.8.1.

1           **E.    Payment**

2           Within 30 days after the Court enters Judgment and the time for appeal has expired, Yelp,  
3 through Simpluris, will transmit each participating Class Member their share of the settlement.  
4 Exh. 1, ¶ 2.6.1. Checks to Class Members will remain negotiable for 90 days. Exh. 1, ¶ 2.6.2. If a  
5 check has not been cashed within 60 days of issuance, Simpluris shall send the Class Member a  
6 postcard reminder about the upcoming deadline. *Id.* If any funds remain from uncashed checks  
7 upon the expiration of the 90 day negotiation period, the funds shall be donated to the Volunteer  
8 Legal Services Program of the Bar Association of San Francisco within 30 days and said donation  
9 would be identified as proceeds from this settlement. Exh. 1, ¶ 2.6.2, Dkt. 37.

10          **IV.    NOTICE PROCESS AND CLAIMS RATE**

11          The Court approved a notice plan which included individual mailed notices that provided  
12 Settlement Class members with information about the Settlement and their options under it. Exh.  
13 1, ¶ 2.4 & Exh. 2 & Exh. 3. The parties agreed to a California Notice and a National Notice, both  
14 of which included a pre-printed change of address form, a Claim (and Opt In for the National  
15 Class) form, and a postage pre-paid return envelope. *Id.* The parties also agreed to that the  
16 Notices were to spell out the website address of where documents relating to this settlement could  
17 be found, including but not limited to an electronic copy (of one generic-non-Class Member  
18 specific) of both the National and California Notice with associated forms, including a generic  
19 claim form.

20          The Settlement also required Yelp to provide the Settlement Administrator, Simpluris, with  
21 each Class Member's name, last-known address, social security number and number of qualifying  
22 work weeks during the Class Period. Simpluris was to obtain updated address information for  
23 Class Members using a National Change of Address search, a skip trace search, and other means  
24 that Simpluris customarily uses to locate class members, and then within 21 days after preliminary  
25 approval, was required to mail to each Class Member the appropriate Notice and Claim form. If a  
26 Notice is returned with a forwarding address, Simpluris was required to immediately re-mail the  
27 Notice using that address information. If a Notice was returned as undeliverable, Simpluris was to  
28

1 perform a search for a more current address and re-mail the documents. Exh. 1, ¶¶ 2.4.3, 2.4.6,  
2 2.4.9.

3 Class Members were provided 50 days from the mailing of the Class Notice to object to or  
4 request exclusion from the Settlement. Exh. 1, ¶ 1.40.

5 On August 2, 2012, Simpluris mailed 912 Notice Packets to the individuals contained on  
6 the Class List via First Class mail. 105 Notice Packets were returned by the post office. Simpluris  
7 performed a skip trace for all Notice Packets returned without forwarding addresses, and remailed  
8 all returned Notice Packets. In the end, 22 Notice Packets were undeliverable because Simpluris  
9 was unable to find a better address. (Tittle Decl. at ¶¶ 9, 11).

10 On September 6, 2012, the Claims Administrator provided Class Counsel with a randomly  
11 generated list of the names (and only the names) of one hundred (100) Class Members who have,  
12 as of that point, not yet filed a Claim Certification Form. Shortly thereafter, Class Counsel  
13 conducted a public records search of each of person listed on the random list, and contacted those  
14 whose phone numbers appeared on public records searches to alert them of the deadline to submit  
15 the claim form. Vigil-Gallenberg Decl. ¶ 14

16 On September 7, 2012, reminder postcards were mailed to 678 Class Members who had not  
17 submitted a Claim Form or a request for exclusion as of that date. The postcard served as a  
18 reminder of the postmark deadline of September 21, 2012 for Claim Forms and requests for  
19 exclusion, and also provided the physical and e-mail address for the Claims Administrator as well  
20 as the link to the website where the Settlement documents and associated forms could be obtained.

21 To date, 420 Settlement Class Members have submitted claims. Eleven of the claims (8  
22 late claims and 3 deficient claims) are currently in dispute, and an additional 3 individuals not  
23 included on the original class list contend they are entitled to Settlement Payments. On October  
24 16, 2012, Counsel for the parties directed the Settlement Administrator to mail a letter to the 11  
25 late and deficient claimants to obtain information necessary to resolving the disputed claims. The  
26 8 late claimants were sent a letter requesting an explanation of why they were late in submitting  
27 their response, and allowing them until October 26, 2012 to provide that explanation. Title Decl. at  
28

¶ 17. The 3 Class Members who submitted deficient claim forms were sent new claim forms and directed to submit complete claim forms by October 26, 2012. Counsel will review the responses from these 11 individuals and attempt to resolve the disputed claims. If counsel are unable to resolve any disputes informally, they will bring them to the Court for resolution.

The 275 California Claim Forms submitted to date represent approximately 56% of the total number of California Class Members and approximately 67% of the total California workweeks. The 145 National Claim Forms represent approximately 32% of the total number of National Class Members and workweeks.

Simpluris is also responsible for receipt of all requests for exclusion from the Settlement. As of this date, Simpluris has received two requests for exclusion from the Settlement by members of the California Class. Of the requests for exclusion received, both were received or postmarked by September 21, 2012. (*Id.* ¶ 15).

#### **IV. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

##### **A. The Criteria for Final Settlement Approval Are Satisfied**

The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Final approval of a proposed class action settlement will be granted where it is established that the proposed settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1)(C). In determining whether to grant final approval, the Court does not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)).

In the Ninth Circuit, the district court determines the fairness, reasonableness and adequacy of the settlement through a balancing test that considers:

several factors which may include, among others, some or all of the following: the strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation;

the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Id.* The relative importance of any particular factor will depend upon the nature of the claims, the types of relief sought, and the unique facts and circumstances presented by the individual case. *Id.* Furthermore, “[n]ot all of these factors will apply to every class action settlement. Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval.” *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-6 (C.D. Cal. 2004) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

As explained below, the relevant factors support granting final approval to this Settlement.

**1. The Settlement is Fair Given the Strength of Plaintiffs’ Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation**

Plaintiffs contend that Yelp misclassified its Account Executives as exempt and failed to pay them overtime wages in violation of California law and the FLSA, and that it has not identified any potential defenses to the substance of Plaintiffs’ claims. Plaintiffs, however, recognize that potential procedural hurdles exist in this case, which could present a barrier to recovery for many putative class members.

Yelp claims that the majority of Class Members signed overtime claim releases, and that former employees (including two of the named Plaintiffs) have signed severance agreements containing releases which bar their participation in the lawsuit. Yelp also argues a class action prohibition implemented in February 2012 bars Class Members from pursuing their claims in this litigation on a class or collective action basis.

Plaintiffs contend that, with respect to the former employees who signed severance agreements containing general releases, there was no bona fide dispute over unpaid overtime wages at the time the employees executed the agreements and therefore any purported release of such claims is invalid. *See Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1587 (2009) (court must consider “whether a bona fide dispute existed when [plaintiff] signed the release” to determine if the release is effective); *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 803 (2009) (employee can “release his claim to past overtime wages as part of a settlement of a bona



1 fide dispute over those wages”). Similarly, Plaintiffs allege that the releases of wage claims signed  
 2 by current employees are invalid because Yelp did not make adequate disclosures to the employees  
 3 before obtaining the releases (including, for example, telling them that they may have been  
 4 misclassified, or that the company anticipated a lawsuit to recover those wages). Plaintiffs contend  
 5 that this concealment renders void any purported release of such claims. Further, Plaintiffs  
 6 contend that the releases upon which Yelp relies do not waive the FLSA claims asserted in this  
 7 action, because under controlling law such claims may only be waived pursuant to a court-  
 8 supervised release. Plaintiffs also contend that Yelp's newly-instituted class action waiver,  
 9 instituted after Plaintiffs left their employment with Yelp, does not prevent them from seeking  
 10 classwide resolution of their claims and those of the putative class.

11 Although Plaintiffs believe that they should prevail if forced to litigate Yelp's asserted  
 12 defenses, they recognize the possibility of adverse rulings on each of these issues. This Settlement  
 13 recognizes that the existence of executed releases and a potential class action prohibition present  
 14 legal and factual questions that will involve substantial pretrial motion practice and may bar  
 15 participation of many class members, as well as narrow the scope of the case.

16 Also, while Plaintiffs vigorously contend that the claims in this case are appropriate for  
 17 class certification, Yelp will contest certification in the absence of this Settlement. This Settlement  
 18 avoids the risk that Plaintiffs would not prevail on their Rule 23 motion or defeat any  
 19 decertification motion under 29 U.S.C §216(b).

20 In sum, the presence of the potential procedural hurdles Plaintiffs face, make the outcome  
 21 of Plaintiffs' claims uncertain and a lengthy appeal likely. This Settlement avoids that substantial  
 22 uncertainty, while ensuring that Class Members receive consideration now for a release of their  
 23 claims. *See* Rukin Decl., ¶ 12.

## 24 **2. The Settlement is Fair Given the Potential Recovery**

25 The Settlement sum is also fair and reasonable in light of the potential recovery. Yelp's  
 26 position in the litigation was that many Class Members worked no overtime hours, and Yelp  
 27 provided Class Counsel with data which according to Yelp reflects that Class Members worked an  
 28



average of between 12 minutes of overtime per week and 2 hours and 20 minutes of overtime per week. If Plaintiffs were ultimately able to prove up the high end of this range—2 hours and 20 minutes of overtime per week—the total overtime wages owed to the California Class would be approximately \$1,392,547.<sup>4</sup> The Maximum Settlement Portion for Payments to California Participating Claimants (\$586,667) represents forty two percent of this overtime calculation, while the actual approximate \$455,000 California Settlement Sum being paid to California Class Members (after attrition of a portion of the initial attorneys' fee amount) constitutes approximately 48 percent of the overtime wages owed to the participating California Class members. Rukin Decl., ¶ 10.<sup>5</sup>

Further, this Settlement affords relief to Class Members who likely would never have filed individual claims for unpaid overtime wages, due to a belief that they validly released their claims to unpaid wages, fear retaliation, or are otherwise concerned about the potential adverse consequences of participating in this litigation. Rukin Decl., ¶ 11. Under the circumstances of the case, the amount of the Settlement is fair, adequate, and reasonable. *See In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding a recovery of one sixth (16.67%) of the potential recovery adequate in light of the plaintiff's risks).

### 3. The Plan of Allocation is Fair Adequate and Reasonable

The plan of allocation of the Settlement to Class Members is also fair and reasonable. Based on the information and data reviewed investigating these claims, Counsel have no reason to believe that any one Account Executive would have worked materially more overtime hours, on average, than any other Account Executive. For this reason, the Settlement provides that the

<sup>4</sup> 21,345 workweeks x \$28 average OT rate of pay x 2.33 OT hours per week. The unpaid overtime owed to non-California FLSA Class Members (using that same 2.33 hour assumption) would be significantly lower on a per capita basis given the fluctuating workweek method of calculating overtime under the FLSA. Under the FLSA, where an employee has been paid on a salary basis, unpaid overtime is calculated by dividing the salary by the *total hours worked* (including overtime hours) to obtain a regular hourly rate of pay, and then multiplying that regular rate by .5 (rather than 1.5). The resulting amount is owed for each overtime hour worked. <sup>5</sup> .67 x \$1392,547 = \$933,006. Assuming Class Members all worked 2.33 hours of overtime per week, Participating California Class Members are receiving \$453,000 for claims worth \$933,006.

1 Settlement shall be allocated based on workweeks worked by Class Member (the standard  
2 allocation methodology in wage and hour cases).

3 Additionally, the Settlement allocates a larger per week recovery to California Class  
4 members than the National Class members (assuming all eligible class members participate in the  
5 settlement) because, as noted above, California law provides for greater remedies and a higher  
6 overtime rate and different calculation methodology than the FLSA.

7 **4. The Settlement Reflects the Informed Views of Experienced Counsel and Is**  
8 **the Product of Serious, Arm's-Length Negotiations Conducted After**  
9 **Extensive Discovery and Investigation**

10 Courts afford "Great weight" to the recommendation of counsel, "who are most closely  
11 acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomm.*, 221 F.R.D. at 528  
12 (quotations and citations omitted). Here, experienced Class Counsel investigated the Class claims  
13 and Yelp's potential defenses. This investigation included the interviews of various putative class  
14 members, the review of Yelp's compensation policies and workweek data, and an analysis of the  
15 case law relevant to Plaintiffs' claims and Defendant's defenses. (Rukin Decl., ¶¶ 6, 15). This  
16 process allowed Counsel to assess the strengths and weaknesses of the claims against Defendant  
17 and led Counsel to conclude that the risk/reward calculus favored settlement on the terms obtained.

18 **5. The Lack of Opposition by the Class Supports Approval of the Settlement**

19 "The reactions of the members of a class to a proposed settlement is a proper consideration  
20 for the trial court." *Nat'l Rural Telecomm.*, 221 F.R.D. at 528 (quoting 5 Moore's Federal  
21 Practice § 23.85[2][d] (Matthew Bender 3d ed.)). Here, the reaction has been positive. Two thirds  
22 of the total California workweeks and one third of the total National workweeks have been  
23 claimed. Only two California Class Members have opted out of the Settlement, and to date no  
24 Class Member has objected to the Settlement. This reaction demonstrates the fairness,  
25 reasonableness, and adequacy of the settlement.

26 **B. The Requested Service Payments Are Reasonable**

27 In the Ninth Circuit, "[i]ncentive awards are fairly typical in class action cases." *Rodriguez*  
28 *v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). In deciding on the amount of an incentive

award, “the court must evaluate each request individually, taking into account the following factors: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the duration of the litigation and the amount of time and effort the plaintiff expended in pursuing it; and (4) the risks to the plaintiff in commencing the litigation, including reasonable fears of workplace retaliation, personal difficulties, and financial risks.” *Harris v. Vector Marketing Corp.*, No. C-08-5198, 2012 WL 381202, at \*7 (N.D.Cal., Feb. 6, 2012), quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (“the court must balance ‘the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment.’”). *See also Garner v. State Farm Mut. Auto. Ins.*, No. CV 08 1365, 2010 WL 1687832, at \*17 n.8 (N.D. Cal. Apr. 22, 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of \$20,000 or more where . . . the class representative has demonstrated a strong commitment to the class” and collecting cases).

Here, the three representative Plaintiffs each seeks a very modest service award of \$5,000. These payments recognize the time and effort that Plaintiffs invested in assisting Class Counsel with the investigation, prosecution, and settlement of the case, and accepting the risk of an adverse result. Rukin Decl., ¶ 12. In addition, the payments recognize the additional obligations that these representative Plaintiffs will incur as a result of the Settlement, including the requirement that they each execute a general release of any and all known and unknown claims that they may have against Yelp. Rukin Decl., ¶ 12, Exh. 1 ¶ 2.8.2. Under the circumstances, these modest \$5,000 incentive awards are reasonable. *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525, 2008 WL 3287154, at \*6 (N.D.Cal., Aug. 6, 2008) (Chen, J.) (despite the fact that “his participation in the case appears limited,” by “expos[ing] himself to the risk of criticism” plaintiff was entitled to a “modest” \$5,000 incentive award).

### **C. The Attorneys’ Fees and Costs Requested Are Reasonable**

Class Counsel’s fee and cost request is fair, reasonable, and appropriate under a common fund analysis. The Ninth Circuit has approved the use of fund percentages as a reasonable manner

to determine attorneys' fees. *See Vizcaino v. Microsoft Co.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mex. Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S.Ct. 1541, 1550 n. 16 (1984)); *In re Omnivision Tech., Inc.*, No. C-04-2297 SC, 2007 WL 4293467, at \*8 (N.D. Cal. Dec. 6, 2007) (observing that "use of the percentage method in common fund cases appears to be dominant"). In the Ninth Circuit, 25 percent of the common fund is the "benchmark" for an attorneys' fees award. *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989).

Here, Class Counsel's fee request of \$205,000 amounts to approximately 25 percent of the monies actually being paid out by Yelp under the Settlement.<sup>6</sup> The requested fee award is therefore reasonable under the common fund approach.

The requested fee is also justified by the financial risks undertaken by Class Counsel in this litigation. Counsel accepted and litigated this class action solely on a contingency fee basis. Counsel has received no compensation for attorney time to date, nor for any of the considerable expenses incurred. Moreover, there has never been any guarantee that counsel would be reimbursed for the costs, or paid for their time. (Rukin Decl., ¶ 15)

A lodestar cross-check further supports the reasonableness of the requested fee. Class Counsel have incurred in excess of \$300,000 in lodestar litigating and resolving this case. Rukin Decl., ¶¶ 16; Vigil-Gallenberg Decl. ¶ 16; Urmey Decl. ¶ 8. The requested attorneys' fee award will result in a payment to Class Counsel of 2/3 of their lodestar (that is, they will obtain negative multiplier, or divider, on their fees), which suggest that the fee request is reasonable. *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 854 (N.D.Cal.2010) (in performing lodestar cross-check, court determined that negative multiplier "suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel").

Finally, Class Counsel are also entitled to reimbursement of their litigation costs in addition to a benchmark fee award, *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL

<sup>6</sup> Under the terms of the Settlement, while Class Counsel may seek an award of attorneys' fees in an amount up to \$312,500, any portion of this amount not sought accretes to the Settlement Sum paid to Participating Class Members. .

454747, at \*7 (S.D. Cal. Aug. 30, 1990). In this case, Class Counsel incurred \$9,461.62 in expenses in connection with the litigation and settlement of this action, and request reimbursement of those costs. Rukin Decl., ¶¶ 13, 14; Vigil-Gallenberg Decl. ¶17; Urmey Decl. ¶ 9.

A copy of this motion will be made available on the website designated in the Settlement so that Class Members are informed about the request for attorneys' fees and costs. Dkt. No. 37 ¶¶ 1& 3. Class Members have until ten days following the filing of this Motion to raise any objections to the fee request. Courts have observed that the absence of any objections to the fees and costs requested supports the conclusion that the requested award is fair, adequate, and reasonable. *See In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at \*15 (C.D. Cal. Jun. 10, 2005) (citing *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 148-49 (E.D. Pa. 2000); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326-8 (E.D.N.Y. 1993)).

#### **D. The Requested Administrative Costs Are Reasonable**

Lastly, the request for reimbursement of expenses requested by the Settlement Administrator is reasonable. As set forth in the Administrator Declaration of Krista Tittle, Simpluris, Inc. prepared the class notices for mailing, mailed over 912 class notices, conducted necessary follow-up with regard to returned notices, mailed approximately 678 postcards reminding Class Members of the deadline to submit a claim form, or opt-out, set up a website containing the settlement documents and associated forms, and has processed the 426 claims received as well as the requests for exclusion, change of address forms, and disputes raised. (Tittle Decl., ¶¶ 4, 7, 14-17 ). Simpluris has requested reimbursement of expenses in the amount of \$16,000.

#### **V. CONCLUSION**

For all the foregoing reasons, Plaintiffs respectfully request that the Court (1) grant final approval of the proposed Settlement, (2) approve the requested service awards of \$5,000 each to named plaintiffs (3) approve Plaintiffs' request for attorneys' fees and costs in the amount of \$214,461.62, (4) approve payment of settlement administrative costs in the amount of \$16,000; and

1 (5) approve payment to LWDA of \$7,500 to compensate it for the State of California's share of the  
2 PAGA penalties claimed in this action.

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4  
5 Dated: October 19, 2012

Respectfully submitted,

6 RUKIN HYLAND DORIA & TINDALL LLP

7 By: /s/ Peter Rukin

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